In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1431

HERBERT L. STERN, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that this contract action, brought by the United States against petitioner and respondent Gardner, is barred by the six-year statute of limitations in 28 U.S.C. 2415(a).[1]

1. In 1966, the Drillmation Company (the Company) entered into two contracts with the Department of the Army. Difficulties were encountered in performing both contracts, and the Company eventually advised the Army on April 27, 1967, that it was unable to continue performance. The government contracting officer then terminated the two contracts for default, one on May 19, 1967, and the other on May 24, 1967 (Pet. App.

[1]The pertinent parts of 28 U.S.C. 2415, and of the other relevant statutory provisions, are set out at Pet. 3-4.

7a). As provided in the standard "disputes clause" of the contracts (see Pet. App. 7a, n. 3), the Company appealed to the Armed Services Board of Contract Appeals (ASBCA), challenging the contracting officer's finding that it had defaulted on the contracts (Pet. App. 7a-9a).

In January 1968, while that appeal was pending, the United States and the Company (whose corporate name had been changed to Eight Mile Road Defense Contractors, Inc.) entered into a "deferral agreement," whereby the Army agreed to defer administrative procedures for the collection of its claim until after the outcome of the contractor's appeal to the ASBCA; deferral was to be accomplished by withholding circulation of the Company's name on the government's list of recalcitrant debtors and by delaying the referral of the claim to the General Accounting Office.[2] In return for the government's promised deferral, the Company agreed to pay the government any amount found due by the ASBCA "within 45 days of the date of [its] decision * * *" (Pet. App. 11a).[3]

On April 10 and 11, 1969, the ASBCA denied the Company's administrative appeals, in effect deciding that the Company owed the government more than $1.5

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[2]The pendency of a contractor's appeal, while suspending the government's right to institute judicial proceedings against the contractor to collect a claim (*Crown Coat Front Co.* v. *United States*, 386 U.S. 503), does not suspend the government's right to collect a claim administratively (*e.g.*, by offset). The object of deferral agreements is to prevent undue hardship to small business concerns by collection during the pendency of an appeal, and also to avoid overcollections (see 32 C.F.R. 163.112, relevant parts of which are set out at Pet. 4).

[3]Pertinent portions of the deferral agreement are set forth in the Appendix to this memorandum.

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million. The Company, however, did not pay this amount to the government in accordance with the deferral agreement (*i.e.*, by May 25-26, 1969, 45 days after the ASBCA's adverse decision), and indeed, still has not paid any of it.

Prior to the denial of its administrative appeals, the Company surrendered all of its assets to a lien-holding bank, which sold the assets to satisfy its lien (Pet. App. 9a). The remainder of the proceeds realized by the sale ($170,528.43) was paid by the bank to the petitioner and respondent Gardner, who were officers of the Company. Petitioner and respondent Gardner distributed these monies to other creditors while aware of the Company's obligation to the United States (Pet. App. 9a). Petitioner states (Pet. 8) that this distribution occurred between May 1967, and April 10, 1968.

On November 6, 1973, the United States commenced this suit in the district court against petitioner and respondent Gardner, claiming that under 31 U.S.C. 192 they were personally liable for distributing the Company's assets in violation of the government's priority under 31 U.S.C. 191. The district court dismissed the complaint, holding that the action was barred by the six-year limitation period of 28 U.S.C. 2415. That Section bars a suit upon any "express or implied" contract "unless the complaint is filed within six years after the right of action accrues * * *" (Pet. 3). In the district court's view, the cause of action accrued in May 1967, when the contracts were terminated for default, and the six-year limitation period had therefore expired when the instant suit was filed (Pet. App. 3a-4a).

The court of appeals reversed, holding that the deferral agreement, in which the Company promised to pay the amount found due by the ASBCA within 45 days of its

decision, *i.e.*, by May 1969, had, upon the Company's failure to perform its agreement, given rise to a new cause of action on that date (Pet. App. 6a-13a). The instant suit, which the court of appeals found was predicated upon the breach of the deferral agreement (Pet. App. 10a, 12a), was therefore timely.

2. The question presented involves only the validity of the determination, for purposes of the statute of limitations, that this particular suit was based upon a breach of the deferral agreement rather than a breach of the underlying contract. That ruling turns upon the meaning of the deferral agreement,[4] and is correct.

By entering into the deferral agreement, the Company expressly agreed to pay the government any amount found due by the ASBCA "within 45 days of the date of [its] decision * * *" (Pet. App. 11a). The effect of such a promise was to require payment of that amount shortly after the administrative decision, without requiring the government to await the outcome of any judicial action the Company might pursue.[5] As the court of appeals held (Pet. App. 13a), the Company's promise "was based on valuable consideration," namely, the government's agreement "not to circulate the Company's name on a 'list * * * of recalcitrant debtors' or 'transfer the case to the U.S. General Accounting Office or the Department of Justice.'"

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[4]As petitioner concedes (Pet. 9), substantive questions concerning petitioner's liability under 31 U.S.C. 191-192 (or otherwise) for the Company's breach of the deferral agreement have not been addressed by the courts below and thus are not ripe for review by this Court.

[5]The Company might have sought judicial relief in the Court of Claims (*Crown Coat Front Co.* v. *United States*, *supra*), and if it had prevailed, the government would, of course, have refunded the amount paid under the deferral agreement.

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The deferral agreement was therefore a new contract, which, when breached by the Company in May 1969, gave rise to a "new cause of action * * * under 28 U.S.C. 2415" (Pet. App. 13a). The government had until May 1975, to sue for the breach of this contract, and the instant action, filed on November 6, 1973, was therefore timely.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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[6]Contrary to petitioner's assertion (Pet. 22-24), permitting a timely suit by the government for the breach of a promise for which it gave valuable consideration is fair. Petitioner's other specific arguments are beside the point. First, petitioner contends (Pet. 10-13) that 28 U.S.C. 2415 forbids "tolling" the statute of limitations by a contractual provision. But the court below expressly reserved decision on that question (Pet. App. 10a), and held simply that the deferral agreement was an independent promise to pay the amount found due by the ASBCA in 1969, thus giving rise to a new cause of action. Second, there is no conflict between the decision below and *United States* v. *Motsinger*, 123 F. 2d 585 (C.C.A. 4), as petitioner contends (Pet. 20). In *Motsinger*, the court held that a statute of limitations bars a suit against the fiduciary (here the petitioner) when the suit would be barred against the principal debtor (the Company). In this case, by virtue of the deferral agreement, the statute of limitations had not run against the Company, a promisor under the agreement, and hence it did not run against petitioner.

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APPENDIX

AGREEMENT BETWEEN DRILLMATION COMPANY, INC.
NOW KNOWN AS EIGHT MILE ROAD DEFENSE
CONTRACTORS, INC.
1601 Wanda Avenue
Ferndale, Michigan 48220
and
THE DEFENSE SUPPLY AGENCY
CAMERON STATION, ALEXANDRIA, VIRGINIA 22314

1. A Defense Supply Agency (DSA) Contracting Officer by formal decision has found that Drillmation Company, Inc. (Eight Mile Road Defense Contractors, Inc.), hereinafter referred to as the Contractor, owes the U.S. Government a total principal amount of $1,541,321.60 plus interest at the rate of 6% per annum as stipulated on the reverse hereof under Contracts DA 19-058-AMC-1509(W) and DA 19-058-AMC-1645(W).

2. The Contractor denies existence of such debt and has appealed the Contracting Officer's decision to the Armed Services Board of Contract Appeals (ASBCA).

3. The ASBCA has docketed the appeal as No. 12501 for Contract 1509(W) and 12579 for Contract 1645(W).

4. The Contractor agrees to pay to the DSA the amount, plus accrued interest, found due by reason of the ASBCA decision on the appeal, or if the appeal is dismissed by the Board without decision, the amount mentioned in paragraph 1 above. Such payment in either case shall be without prejudice to the Contractor's right to move for reconsideration or to pursue such other remedies at law as it may have. The Contractor further agrees to make such payment in full within 45 days of the date of the ASBCA decision or dismissal of the appeal or to make arrangements within that 45 day period to pay the

amount on an installment basis within the bounds of the minimum requirement outlined in paragraph 5 below.

* * * * *

6. The DSA agrees not to circulate the name of the Contractor on certain U.S. Government lists designed to effect settlement of accounts of recalcitrant debtors and agrees not to transfer the case of the U.S. General Accounting Office or the Department of Justice before 45 days after the ASBCA decision on the appeal is published and to do so then only if the Contractor fails to comply with paragraph 4 above or fails to fulfill any agreement reached under paragraph 5 above.